BUNGSAR HILL HOLDINGS SDN BHD

v.

DR AMIR FARID DATUK ISAHAK

COURT OF APPEAL, KUALA LUMPUR
MOHD SAARI YUSOFF JCA
MOHD NOOR AHMAD JCA
RAHMAH HUSSAIN JCA
[CIVIL APPEAL NO: W-03-72-1996]
7 JULY 2003

BANKRUPTCY: *Adjudication order - Annulment - Exercise of court's discretion - Principles - Debtor ought not to have been adjudged a bankrupt - Whether debtor able to pay debts - Whether there was sufficient cause that adjudication and receiving orders ought not to have been made - Bankruptcy Act 1967, ss. 6(3), 105(1) - Genuine and deserving cases*

This was an appeal by the petitioning creditor ('the appellant') against the decision of the learned judge allowing the debtor's appeal against the order of the senior assistant registrar dismissing his application to set aside the receiving and adjudicating orders made against him. It was the debtor's contention that because both the bankruptcy notice and petition were served on him by way of substituted service, he was not aware of the hearing date and thus could not instruct his solicitors to oppose the bankruptcy petition. Conversely, the appellant submitted that since the debtor had committed an act of bankruptcy and the procedure respecting the bankruptcy proceedings was not contested, there were, therefore, no grounds for the learned judge to annul the adjudication order and rescind the receiving order made against the debtor.

Held:
Per Rahmah Hussain JCA

[1] The power of the court to annul an adjudication is wholly discretionary. Under s. 105(1) of the Bankruptcy Act 1967 ('the Act'), the court may annul an adjudication order if it is of the opinion that the debtor ought not to have been adjudged a bankrupt or if the debts of the bankrupt have been paid in full. In the present case, the learned judge was of the opinion that the debtor herein ought not to have been adjudged a bankrupt because he was still **able to pay his debts** within the meaning of s. 6(3) of the Act. There was sufficient cause that the adjudication and receiving orders ought **not** to have been made. (pp 509 a-h, 510 d-h & 511 a-b)

[2] It is only in genuine and deserving cases that a debtor may have recourse to the ground 'ought not to have been adjudged bankrupt' under s. 105(1) of the Act. There is, therefore, no fear of opening the floodgate to all debtors. (p 511 f)

[Petitioning creditor's appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah satu rayuan dari pemiutang mempetisyen ('perayu') terhadap keputusan yang arif hakim yang membenarkan rayuan penghutang terhadap perintah penolong kanan pendaftar yang menolak permohonannya untuk mengenepikan perintah penerimaan dan perintah penghukuman yang telah dibuat terhadapnya. Penghutang mengatakan bahawa olehkerana kedua-dua notis kebankrapan dan petisyen diserahkan kepada beliau secara serahan ganti, beliau tidak menyedari tarikh bicara dan dengan itu beliau tidak dapat untuk memberikan arahan kepada peguamcaranya untuk menentang petisyen kebankrapan tersebut. Perayu pula sebaliknya menghujahkan bahawa olehkerana penghutang telah melakukan perbuatan kebankrapan dan prosedur berhubung dengan prosiding kebankrapan tidak dipertikaikan, maka dengan itu, tiada alasan bagi yang arif hakim untuk membatalkan perintah penghukuman dan perintah penerimaan yang telah dibuat terhadap penghutang.

Diputuskan:
Oleh Rahmah Hussain HMR

[1] Kuasa mahkamah untuk membatalkan penghukuman adalah diatas budi bicara mahkamah keseluruhannya. Dibawah s. 105(1) Akta Kebankrapan 1967 ('Akta tersebut'), mahkamah boleh membatalkan perintah penghukuman jika ia berpendapat bahawa penghutang tidak wajar untuk dihukum bankrap atau jika hutang sibankrap telah dibayar dengan penuh. Dalam kes ini, yang arif hakim berpendapat bahawa penghutang ini tidak wajar untuk dihukum bankrap kerana beliau masih berupaya untuk membayar hutang beliau mengikut erti s. 6(3) Akta tersebut. Terdapat cukup sebab bahawa perintah penghukuman dan perintah penerimaan tersebut tidak wajar diberikan.

[2] Hanya dalam kes-kes yang sejati dan patut sahaja penghutang boleh menggunakan alasan 'wajar untuk tidak dihukum bankrap' dibawah s. 105(1) Akta tersebut. Oleh yang demikian, tiada kebimbangan perobohan benteng terbuka kepada semua penghutang.

Rayuan pemiutang mempetisyen ditolak.]

Case(s) referred to:
Kamaruddin Mohamed v. United Motor Works (M) Sdn Bhd [1982] 1 MLJ 126 ***(refd)***
Re Hester, ex p Hester 22 QBD 632 CA ***(foll)***
Re Otway ex parte [1895] 1 QBD 812 ***(foll)***
Re Yap E Boon [1933] 2 SSLR 217 ***(refd)***
Sama Credit & Leasing Sdn Bhd v. Pegawai Pemegang Harta, Malaysia [1995] 2 CLJ 368 SC ***(refd)***
Ting Nguk Yong v. Bank Utama (Malaysia) Bhd [1999] 1 CLJ 173 HC ***(dist)***

Legislation referred to:
Bankruptcy Act 1967, ss. 6(3), 105(1)

Bankruptcy Act 1883 [UK], s. 35

For the appellant/creditor - Kamil Azman; M/s Skrine & Co
For the respondent/debtor - Nor Hafsah Hamid; M/s Adam & Co

[Appeal from High Court, Kuala Lumpur; Bankruptcy No: D2-29-1837-93]

Reported by Gan Peng Chiang

JUDGMENT

Rahmah Hussain JCA:
In the court below, the learned judge of the High Court in Kuala Lumpur had reversed the order of the senior assistant registrar, who, on 10 June 1996, dismissed with costs the respondent's (debtor) application for the setting aside of the receiving and adjudication orders made against him on 27 June 1995. Hence this appeal.

The facts of this case can be summarised as follows: The debtor is, and has been since 1985, a partner with two other doctors in a medical partnership carrying on business in the name of "Poliklinik Kotaraya". He has a 35% share in the partnership. In 1989 there arose between the three partners a dispute which gave rise in that year to three civil suits between them. On 13 March 1990 two interim receivers and managers of the partnership were appointed by the court pending final resolution of the dispute between the partners. By the said order also, the receivers were authorised to pay a monthly allowance of RM4,000 only to each of the partners.

Despite the dispute, the partnership continued to be a viable business enterprise and as at 30 December 1994 its net current assets amounted to RM2,047,442.12. The debtor had a share in the net profit for 1994 which amounted to RM660,433.52. On 26 February 1996, the receivers and managers confirmed that the amount of cash proceeds due to the debtor (after the partnership was sold under a settlement agreement entered into by the three partners on 10 November 1993) was in the region of RM400,000 after deducting all moneys owed by him to the partnership.

As regards the present appeal, it arose out of a suit in the Sessions Court brought by the petitioning creditor (appellant in this appeal) against the debtor, whereby it obtained judgment in the sum of RM32,095.41 with interest, plus RM2,033.50 for costs. Based on that judgment the petitioning creditor (more than two (2) years later) that is in 1993, commenced bankruptcy proceedings against the debtor without, it seems, resorting first to ordinary execution to recover the debt, which then stood at RM45,693.81.

The debtor claimed that he was not aware of the bankruptcy notice and bankruptcy petition as the documents were served on him by way of substituted service. As a result, he was not aware of the hearing date and did not instruct solicitors to oppose the petition. Finally on 27 June 1995 adjudication and receiving orders were made against him.

It is to be noted that the bankruptcy action against the debtor was conducted during the period when efforts were being made to sell the partnership business pursuant to the settlement agreement.

Before us, learned counsel for the appellant contended that since the debtor had committed an act of bankruptcy on 8 February 1994 and that the procedure on bankruptcy proceedings was not contested, there was no ground for the court to annul the adjudication order and rescind the receiving order made on 27 June 1995. In support of his contention, he relied on the Federal Court case of *Kamaruddin bin Mohamed v. United Motor Works (M) Sdn Bhd* [1982] 1 MLJ 126, wherein it was held:

> (2) in this case the debtor had not complied with the bankruptcy notice and therefore there was an act of bankruptcy on which the petition could be grounded;
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> (5) in this case, the appellant had not paid his debts and the other grounds on which he relied were not proved to the satisfaction of the court and therefore there were no grounds to warrant an annulment of the adjudication order.

He went on to say that in the present case the learned judge had relied solely on the first limb of s. 105(1) of the Bankruptcy Act 1967, which is "a debtor **ought not to have been adjudged bankrupt**" (emphasis added), when he formed the opinion that at the time of the adjudication, the debtor was able to pay his debts. However, it was learned counsel's contention that the ability to pay was of no relevance unless payment was made towards satisfaction of the judgment debt and that, without such payment the debtor was still committing an act of bankruptcy, which gave the appellant the right to apply for both the adjudication and receiving orders.

The law is clear, in that the power of court to annul an adjudication order, is discretionary. Section 105(1) of the Bankruptcy Act 1967 provides, *inter alia* two situations under which an annulment may be granted:

(1) where in the opinion of the court the debtor ought not to have been adjudged bankrupt, or

(2) where the debts are paid in full.

The learned judge made it clear that he was exercising his discretionary power under the first limb of s. 105(1) of the Bankruptcy Act 1967, when he said:

> On that premise, I came to the conclusion that the debtor **ought not to have been adjudged bankrupt** (emphasis added) because, at the time that he was adjudged bankrupt, he was a person who was able to pay his debts, which is a ground under subsection (3) of section 6 for refusing a petition.
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> I was of the view that a debtor is able to pay his debts for the purposes of subsection (3) of section 6 if he is solvent, that is to say, he has enough assets to meet his liabilities. It does not mean that he has ready cash to settle his debts because that would be as good as requiring that he actually settles his debts to prove that he is able to pay his debts. But it must be borne in mind that when a petition is dismissed under subsection
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> (3) of section 6 on the ground that the debtor is able to pay his debts, he would not have actually paid his debts.

Now sub-s. (3) of s. 6 of the Bankruptcy Act 1967 lays down several situations in which the court may dismiss a bankruptcy petition. It reads:

> (3) If the court is not satisfied with the proof of the petitioning creditor's debt or of the act of bankruptcy or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.

In the present case the learned judge was of the view that on the facts existing at the date of the adjudication order there was sufficient cause why no order ought to be made. He had this to say:

> The debtor was solvent. Adjudging him a bankrupt would restrict his freedom to act to obtain the key to open the safe where his money is locked up. If he was not adjudged bankrupt, the petitioning creditors could still, and with greater ease, get paid by ordinary execution. They would be able to garnish for their debt on the money belonging to the debtor in the hands of the receivers and managers.

However the learned judge's view did not find favour with the appellant. According to counsel, the debtor was only relying on "some money tied up somewhere", but at the time the adjudication order was made on 27 June 1995 the petitioning creditor's debt was in existence and that an act of bankruptcy had been committed by the debtor. As such the order was properly made. He added, the position would have been different if at the date the act of bankruptcy was committed the creditor's debt was **not** (emphasis added) in existence in which case the adjudication and receiving orders were wrongly made and the court has no discretion to refuse to set aside such orders. (See *Re Yap E. Boon* [1933] 2 SSLR 217).

The other case referred to by learned counsel *Ting Nguk Yong v. Bank Utama (Malaysia) Bhd* [1999] 1 CLJ 173, is with respect, not applicable to our case as it relates to the second limb of s. 105(1) of the Bankruptcy Act 1967. Therefore we shall not labour on that.

Learned counsel for the respondent (debtor) on the other hand relied heavily on the case of *Re Otway Ex parte* [1895] 1 QBD 812 CA, where, she said, the facts are the same as in our case. In that case a debtor had a life interest, which ceased on bankruptcy, in the income of certain property. He had no other property. He proposed to insure his life and to set aside half his income for the purpose of keeping up the insurance, and paying his creditors a composition of 10s. in the pound. The petitioning creditor did not agree to this proposal, and a receiving order was made on his petition. On appeal it was held that "the fact that the effect of a receiving order would be to deprive the debtor of the only asset available for the payment of a composition to his creditors was a sufficient cause why no order should be made".

In his judgment Lord Esher MR has this to say: (at p. 814 – 2nd paragraph, lines 5-14)

> Now here the evidence is clear that if there is this bankruptcy the only asset out of which the bankrupt can pay any creditors, including the petitioning creditor, is an asset which by the bankruptcy is put an end to, and nothing is left. The case comes within s. 7, sub-s. 3, of the Bankruptcy Act 1883, which says that there are sufficient causes, besides those specially named in the section, for which the Court may come to the conclusion that no order ought to be made, and that the petition should be dismissed.

Another case relied upon by learned counsel for the respondent is *Re Hester, ex parte Hester* 22 QBD 632, CA where the same words (as in our s. 105(1) Bankruptcy Act 1967) in s. 35 of the English Bankruptcy Act 1883 were considered. Cave J had this to say: (at p. 633)

> The language of s. 35 is somewhat vague, and I think it was intentionally left vague, in order that the Court may be able to do full and complete justice. I do not think it was intended that the application should be made on purely technical grounds, which might or might not have been successful at the time when the order was made, but that the words were meant to apply to larger objections – more equitable objections – such, for instance, as that the matter cannot be successfully worked out in bankruptcy, that the objects of the law of bankruptcy cannot be sufficiently attained by an adjudication, and that there are reasons why, in the interest of all the creditors, and without detriment to the public, the adjudication may be annulled. I think the section gives the Court a very wide discretion.

In the Supreme Court case of *Sama Credit & Leasing Sdn Bhd v. Pegawai Pemegang Harta, Malaysia* [1995] 2 CLJ 368, it was held that "where the court of first instance has exercised its discretion, a strong case would be required to authorise or induce the Appellate Court to interfere". Thus, in the circumstances of the present case, we are satisfied that the learned judge was justified in interfering with the exercise of discretion by the senior assistant registrar.

However a final point which we feel deserves mention is learned counsel for the appellant's fear that by annulling the adjudication order on the ground that "the debtor has money tied up somewhere", might open the floodgate, so to speak, where debtors who neglect to oppose a petition can later be freed from adjudication by resorting to s. 105(1) of the Bankruptcy Act and using the abovesaid ground. To that, we say that we totally agree with what the learned judge had to say, which is:

> The answer to the fear is that the ground in section 105 that a debtor ought not to have been adjudged bankrupt can only avail a debtor in cases that are seen to be genuine and are deserving. Moreover, it is difficult to conceive of an actual case where a debtor would be so foolhardy as to deliberately take the risk of allowing himself to be adjudged bankrupt in the hope of later securing annulment of the adjudication through section 105.

In the circumstances, we dismissed the appeal and awarded costs to the respondent. We also ordered that the deposit be paid towards taxed costs.

Our decision was delivered on 20 March 2003 and in the meantime one member of the panel, Mohd. Saari bin Yusoff JCA had since retired. The other member of the panel, Mohd. Noor bin Ahmad JCA has read this judgment in draft and has expressed his agreement with the same.